STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY FOSTER,

Plaintiff-Appellant,

v

DOW CORNING CORPORATION,

Defendant-Appellee.

UNPUBLISHED
July 12, 2005

No. 254539
Midland Circuit Court
LC No. 03-005830-NZ

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right an opinion and order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This is a racial discrimination case arising out of plaintiff's employment with defendant Dow Corning Corporation. The trial court granted defendant's motion for summary disposition, finding that plaintiff failed to establish a prima facie case of racial discrimination because she did not show that she suffered an adverse employment action. Plaintiff argues that she suffered an adverse employment action because she was constructively discharged from her position. We review de novo the trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

In employment discrimination cases under the state Civil Rights Act, MCL 37.2101 *et seq.*, where there is no direct evidence of racial discrimination, the plaintiff must rely on the four steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), to establish a prima facie case of race discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Under *McDonnell Douglas*, the plaintiff must show that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Id*. at 463. If the plaintiff establishes a prima facie case, then there is a rebuttable presumption of discrimination and the burden shifts to the employer to articulate and present admissible evidence in support of a "legitimate nondiscriminatory reason" for its decision. *Id*. at 464; see also *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 173; 579 NW2d 906 (1998). The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the reason offered by the defendant was a mere pretext for unlawful discrimination. *Hazle*, *supra* at 466; *Lytle*, *supra* at 173-174.

For an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than mere inconvenience or an alteration of job responsibilities, and (2) there must be some objective basis for demonstrating that the change is adverse. *Wilcoxon v Minnesota Mining & Mfg*, 235 Mich App 347, 364; 597 NW2d 250 (1999). A plaintiff's subjective impressions as to the desirability of one position over another are not controlling. *Id*. at 364. Further, while constructive discharge is an adverse employment action, it "only occurs when an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Champion v Nationwide Security, Inc*, 450 Mich 702, 710-711; 545 NW2d 596 (1996).

Plaintiff asserts that she was constructively discharged by defendant either when she was forced to take a medical leave as a result of defendant's race-based conduct with no guarantee of rehire, or when defendant eliminated her position with no bona fide option of continued employment. We reject both of these arguments.

Plaintiff first argues that she suffered the adverse employment action of constructive discharge when she was forced to avail herself of medical leave, which eventually resulted in no guarantee of rehire with the company. But "while an employer's action may lead to a constructive discharge, such a discharge itself generally cannot become evident until the employee has, in fact, left the employment. . . . Until the employee resigns, the employer's action has yet to prove to be one of discharge." *Chambers v Trettco, Inc*, 463 Mich 297, 317-318; 614 NW2d 910 (2000). Here, plaintiff did not resign her position when she went on medical leave. In fact, defendant considered her an active employee up to the time she was approved for long-term disability (LTD) benefits. Plaintiff's separation from defendant was the result of her being approved for LTD benefits, a policy defendant applies to all employees who receive such benefits, which is not equivalent to a constructive discharge. See *Sciecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 137; 666 NW2d 186 (2003) (the plaintiff's discrimination claim could not be established where the plaintiff was separated from the employer by the application of employer's neutral LTD policy).

Plaintiff also argues that she was constructively discharged when defendant eliminated her position and she was afforded no real option for continued employment within the company. However, the record reveals that plaintiff was afforded a "bona fide" offer of continued employment with defendant. Therefore, this argument is without merit.

Plaintiff relies on *Scott v Goodyear Tire & Rubber Co*, 160 F3d 1121 (CA 6, 1998), where the court found that the plaintiff was constructively discharged from his employment because the employer offered no option for continued employment. *Scott*, a federal court decision, is not binding authority. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Further, *Scott* appears to be at odds with *Wilcoxon*, *supra*, the leading Michigan authority regarding whether there is an adverse employment action without termination by the employer. Nonetheless, *Scott* is distinguishable from the present case. In *Scott*, the court clearly concluded that the plaintiff had no opportunity for continued employment with the company. Here, plaintiff admitted that she was aware that continued employment was an option that was available to her when her job was eliminated. For these reasons, we find that plaintiff failed to create an issue of fact with regard to whether she suffered an adverse employment action.

Finally, we reject plaintiff's argument that the trial judge abused his discretion when he refused to disqualify himself. This Court reviews a trial court's factual findings on a motion for disqualification for an abuse of discretion, but the application of the facts to the law is reviewed de novo. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

A judge is disqualified if he cannot impartially hear a case, which includes: (1) when he is personally biased or prejudiced for or against a party or attorney; (2) when he has personal knowledge of disputed facts; (3) when he has been involved in the case as a lawyer; (4) when he was a partner of a party or lawyer within the preceding two years; (5) when he knows that he or a relative has an economic interest in the proceeding or a party to the proceeding; (6) when he or a relative is a party or an officer, director, or trustee of a party; (7) when he or a relative is acting as counsel in the proceeding, or (8) when he or a relative is likely to be a material witness in the proceeding. MCR 2.003(B); *Armstrong*, *supra* at 596. The party moving for disqualification bears the burden of proving that disqualification is justified. MCR 2.003(A).

Further, as a general rule, a showing of actual, personal prejudice is required to disqualify a judge under MCR 2.003. *Armstrong*, *supra* at 597. But our Supreme Court has acknowledged that "'there might be situations in which the appearance of impropriety on the part of the judge . . . is so strong as to rise to the level of a due process violation."' *Id*. at 599, quoting *Cain v Dep't of Corrections*, 451 Mich 470, 503, 512 n 48; 548 NW2d 210 (1996). Therefore, a showing of actual bias is not necessary when the judge (1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, factfinder or initial decision maker. *Armstrong*, *supra* at 599. Lastly, a trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption. *Id*.

Plaintiff refers this Court to *In re Fiftieth District Court Judge*, 193 Mich App 209, 213-214; 483 NW2d 676 (1992), where this Court found that the trial judge should have disqualified himself because he had financial and economic ties with the law firm of one of the attorneys appearing before him. However, as we will explain, *In re Fiftieth District Court Judge* is distinguishable from the instant action and, therefore, not applicable. Further, this Court has indicated that "[a]n interest sufficient to disqualify a judge must be such an interest in the subject matter that he will be directly affected through pecuniary or property gain or loss." *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 731; 465 NW2d 395 (1991). Clearly, the indirect and insignificant financial ties of the trial judge's family members to defendant in this case do not meet this test. Here, unlike the judge in *In re Fiftieth District Court Judge*, the trial judge has no direct financial ties to defendant. The only financial ties that he has to defendant are those that are held by his family members. His father is a retired employee of defendant's who collects retirement benefits and his wife has stock ownership in Dow Chemical Company (an affiliate owner of defendant). Such indirect and insignificant financial ties to defendant are not analogous to the financial ties found in *In re Fiftieth District Court Judge* nor do they meet the standard set forth in *Mourad*. Therefore, we conclude that the trial judge did not abuse his discretion in refusing to disqualify himself from this case. Moreover, given our conclusion that plaintiff failed to create an issue of fact with regard to an essential element of her claim, any possible error in the trial judge's refusal to disqualify himself was harmless. *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens